LIBRARY
SUPREME COURT, U. S.
FEB
MICHAEL

IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-5811

JAMES COOPER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

CARL A. VERGARI
District Attorney of Westchester County
Office and Post Office Address
County Courthouse
111 Grove Street
White Plains, New York 10601
(914) 682-2161

By: JANET CUNARD
Assistant District Attorney

TABLE OF CONTENTS

	PAGE
Facts	1
POINT I—A witness before the grand jury has no right to the presence of counsel	3
POINT II—The identification testimony by Arthur Harris was properly admitted without preliminary inquiry	4
Conclusion	6
RELEVANT STATUTES	7

IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. .....

JAMES COOPER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Pursuant to the Revised Rules of this Court, Rule 24, the respondent submits this brief in opposition to the captioned petition for a writ of certiorari.

Facts

At approximately 4:30 p.m., August 28, 1971, Nancy Weeks was walking in the parking lot of Geigy Chemical Corporation when she discovered the savagely beaten body of the defendant's victim, Annie Flythe. The victim had been severely beaten about the head while she was alive and was killed, death being caused by a fractured larynx, a ligature about the neck, and fractured zygomatic and mandibular bones, probably between 4:30 and 6:00 that morning.

Annie Flythe and Arthur Harris spent August 27 together and returned to her apartment about 3:00 a.m.

August 28, going to bed about twenty minutes later. At approximately 4:30 a.m., Mr. Harris awakened to see the defendant, who he had previously known only as James, standing over the victim striking her. The defendant then went into the living room, bent over and put his shoe on. Upon returning to the bedroom, the defendant told Harris that it had nothing to do with him and told Annie to put some clothes on. Annie put on a tan housecoat, the same garment that was on her body when it was discovered.

Annie, screaming, "God, somebody help me" was led out of the apartment by the defendant, knocking over a chair in the process. As she was led down the hall, scuffling and screaming for help, she fell against and clutched at the door of her next door neighbors. As she was led down the stairs and out the front door, Annie Flythe's screaming and kicking was heard by a neighbor on the first floor.

The struggle between the defendant and his victim continued on the sidewalk in front of the building and after she had been placed in the defendant's car and had gotten out and attempted to return to the building, at which time he struck her and she went limp. Immediately thereafter, the defendant put the victim in his light yellow Rivera and drove away. Annie Flythe was never again seen alive.

The victim's body, upon examination by the Medical Examiner, disclosed numerous wounds including fractures of the left cheekbone, a fracture of the left jaw, a fractured larynx, the latter two having been caused by considerable force, brain hemorrhage, deep penetrating wounds of the face, extensive bruises of the face, neck, upper chest and shoulders, and lacerations of the lips, eyes and extremities. Death was caused by a ligature about the neck, fractures of the temporal zygomatic and mandibular bones, cuts and penetrating wounds of the head and a laceration of the liver.

On August 31, police officers searched the defendant's car and apartment, under authority of a search warrant,

for the weapons with which he committed the crime, bloodstains and the remains of the white cloth used to strangle Annie. In his apartment, during the search, the officers saw the brown pants and striped shirt he was wearing when he left his apartment at 11:45 p.m. August 27, all wet and moldy in a black leather bag, in the living room closet.

The defendant's car, when searched by the officers, was "probably cleaner than the day it came out of the showroom", a usual condition for his car. Yet, even though he had washed his car inside and out sometime after noon on August 28, there was a small amount of blood on the instrument panel. Also found in the car was the remains of the white cloth, a bedsheet given to him by Bernice Lampkin to clean his car.

The victim's body bore a white cloth around the neck covered by a bloodstained white ligature of the same cloth and another piece of that same white cloth around the left arm. Those pieces of cloth and the ones seized from the defendant's car all contained methylsilicone, a common ingredient of car wax. A microscopic examination of the ligature around the victim's neck and the cloth around her arm, left no doubt that they came from the same cloth as those pieces found in the defendant's car.

POINT I

A witness before the grand jury has no right to the presence of counsel.

There is no federal constitutional right to have state charges presented to a grand jury and prosecuted by indictment (*Hurtado* v. *California*, 110 U.S. 516, 28 L Ed 232, 4 S Ct 111). New York, however, requires presentation to a grand jury and prosecution by indictment of all felonies.[1]

---

[1] Effective June 22, 1974, Article 195 of the Criminal Procedure Law permits the waiver of indictment in all but class A felonies. (The State Constitution was amended effective January 1, 1974.)

(NY Constitution Art I Sec 6.) The statutes enacted to implement the state constitutional right provide that a person against whom charges are being considered by a grand jury may appear and testify before that body if he requests to do so and completes a waiver of immunity (190.50, 190.45 CPL). The statute also specifically sets forth those persons who may be present when the jury hears evidence (190.25(3) CPL), and does not include an attorney for a witness. A witness before the grand jury has the right to consult with an attorney[2] and, in a proper case, to leave the grand jury room during his testimony for such purpose (*People* v. *Iannielli*, 21 NY 2d 418, 235 NE 2d 439, cert. den. 393 U.S. 827 (1968) but has no right to the presence of counsel before the grand jury.

> "A witness before a grand jury cannot insist as a matter of constitutional right, on being represented by his counsel . . ."
>
> *Re Groban*, 352 U.S. 330, 1 L Ed 2d 376, 77 S Ct 510 (1957).

POINT II

The identification testimony by Arthur Harris was properly admitted without preliminary inquiry.

On the night of the commission of the crime Arthur Harris viewed the defendant under sufficient lighting conditions from a distance of five feet to six feet on two separate occasions. On the first occasion that the defendant struck the victim, Mr. Harris saw his face and when he returned to speak to Mr. Harris and remove the victim, Mr. Harris again saw his face. While he had never before seen the defendant with his victim, Mr. Harris had previously seen the defendant around town and knew his name

---

[2] The defendant was represented by counsel at the preliminary hearing and at the time he requested to and did appear before the grand jury.

as James. Based upon his observations of the defendant's face, Mr. Harris positively identified him as the person who had attacked Annie Flythe and removed her from her apartment.

On August 31, 1971 Detective Bruno showed Arthur Harris two photographs of the defendant and two or three others of male Negroes. From this group Mr. Harris identified one of the pictures of the defendant as the person who had beaten and removed Annie Flythe on the morning of August 28, 1971.

In support of his motion to suppress any identification testimony by Arthur Harris, the defendant annexed a copy of the preliminary examination testimony during which Harris was examined and then cross-examined about his ability to observe the defendant at the time of the commission of the crime and the photographic identification proceeding.

The preliminary hearing testimony, which was virtually the same as that elicited on trial, indicated that on two occasions that evening the witness had observed the defendant's face and that three days later he had been shown a group of pictures "just of the one individual" from which he identified one of the defendants.

As a result of the testimony elicited at the hearing, the defendant was aware of the prior photographic identification proceeding, and thus able to effectively cross-examine the witness (*Simmons* v. *United States*, 390 US 377, 19 L Ed 2d 1247, 88 S Ct 967 (1968)).

There can be no question that the photographic identification proceeding was not "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" (*Simmons* v. *United States*, *supra*). The proceeding took place three days after the commission of the crime and involved the identification by Mr. Harris of a person he had seen prior to the commission

of the crime. The witness was given a group of pictures and from that group identified one of the two of the defendants. While stating that he thought all the pictures were of the same person, he testified that he had seen one of the photos in the victim's apartment and did not know the identity of the person portrayed.

There is no indication that the photographic identification was improper but in any event, it was clearly shown that the witness' in-court identification was based upon his observations on the night of the commission of the crime and prior observations. The testimony of Arthur Harris identifying the defendant was properly admitted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

CARL A. VERGARI
District Attorney of Westchester County
Office and Post Office Address
County Courthouse
White Plains, New York 10601
(914) 682-2161

By: JANET CUNARD
Assistant District Attorney

RELEVANT STATUTES

Constitution of the State of New York

Article I, Section 6

No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of congress in time of peace, and in cases of petit larceny, under the regulation of the legislature), unless on indictment of a grand jury . . .

Criminal Procedure Law of the State of New York

§ 190.25 Grand jury; proceedings and operation in general

* * * * * *

3. During the deliberations and voting of a grand jury, only the grand jurors may be present in the grand jury room. During its other proceedings, the following persons, in addition to witnesses, may, as the occasion requires, also be present:

(a) The district attorney;

(b) A clerk or other public servant authorized to assist the grand jury in the administrative conduct of its proceedings;

(c) A stenographer authorized to record the proceedings of the grand jury;

(d) An interpreter. Upon request of the grand jury, the prosecutor must provide an interpreter to interpret the testimony of any witness who does not speak the English language well enough to be readily understood. Such interpreter must, if he has not previously taken the constitutional oath of office, first take an oath before the grand jury that he will faithfully in-

terpret the testimony of the witness and that he will keep secret all matters before such grand jury within his knowledge;

(e) A public servant holding a witness in custody. When a person held in official custody is a witness before a grand jury, a public servant assigned to guard him during his grand jury appearance may accompany him in the grand jury room. Such public servant must, if he has not previously taken the constitutional oath of office, first take an oath before the grand jury that he will keep secret all matters before it within his knowledge.

§ 190.45 Grand jury; waiver of immunity

1. A waiver of immunity is a written instrument subscribed by a person who is or is about to become a witness in a grand jury proceeding, stipulating that he waives his privilege against self-incrimination and any possible or prospective immunity to which he would otherwise become entitled, pursuant to section 190.40, as a result of giving evidence in such proceeding.

2. A waiver of immunity is not effective unless and until it is sworn to before the grand jury conducting the proceeding in which the subscriber has been called as a witness.

3. A person who is called by the people as a witness in a grand jury proceeding and requested by the district attorney to subscribe and swear to a waiver of immunity before giving evidence has a right to confer with counsel before deciding whether he will comply with such request and, if he desires to avail himself of such right, he must be accorded a reasonable time in which to obtain and confer with counsel for such purpose. The district attorney must inform the witness of all such rights before obtain-

ing his execution of such a waiver of immunity. Any waiver obtained, subscribed or sworn to in violation of the provisions of this subdivision is invalid and ineffective.

4. If a grand jury witness subscribes and swears to a waiver of immunity upon an express understanding with the district attorney that the interrogation will be limited to certain specified subjects, matters or areas of conduct, and if after the commencement of his testimony he is interrogated concerning another subject, matter or area of conduct not included in the original understanding, he may withdraw or qualify his waiver of immunity accordingly by orally declaring before the grand jury his refusal to testify concerning such other matter unless he is granted immunity with respect thereto. Upon such declaration of withdrawal or qualification, the witness receives immunity with respect to any further testimony which he may give concerning such other matter and the waiver of immunity is to that extent ineffective.

§ 190.50 Grand jury; who may call witnesses; defendant as witness

1. Except as provided in this section, no person has a right to call a witness or appear as a witness in a grand jury proceeding.

2. The people may call as a witness in a grand jury proceeding any person believed by the district attorney to possess relevant information or knowledge.

3. The grand jury may cause to be called as a witness any person believed by it to possess relevant information or knowledge. If the grand jury desires to hear any such witness who was not called by the people, it may direct the district attorney to issue and serve a subpoena upon such witness, and the district attorney must comply with such direction. At any time after such a direction, however, or

at any time after the service of a subpoena pursuant to such a direction and before the return date thereof, the people may apply to the court which impaneled the grand jury for an order vacating or modifying such direction or subpoena on the ground that such is in the public interest. Upon such application, the court may in its discretion vacate the direction or subpoena, attach reasonable conditions thereto, or make other appropriate qualification thereof.

4. Notwithstanding the provisions of subdivision three, the district attorney may demand that any witness thus called at the instance of the grand jury sign a waiver of immunity pursuant to section 190.45 before being sworn, and upon such demand no oath may be administered to such witness unless and until he complies therewith.

5. Although not called as a witness by the people or at the instance of the grand jury, a person has a right to be a witness in a grand jury proceeding under circumstances prescribed in this subdivision:

(a) When a criminal charge against a person is being or is about to be or has been submitted to a grand jury, such person has a right to appear before such grand jury as a witness in his own behalf if, prior to the filing of any indictment or any direction to file a prosecutor's information in the matter, he serves upon the district attorney of the county a written notice making such request and stating an address to which communications may be sent. The district attorney is not obliged to inform such a person that such a grand jury proceeding against him is pending, in progress or about to occur unless such person is a defendant who has been arraigned in a local criminal court upon a currently undisposed of felony complaint charging an offense which is a subject of the prospective or pending grand jury proceeding. In such case, the district attorney must notify the defendant or his attorney of the prospective or pending grand jury pro-

ceeding and accord the defendant a reasonable time to exercise his right to appear as a witness therein;

(b) Upon service upon the district attorney of a notice requesting appearance before a grand jury pursuant to paragraph (a), the district attorney must notify the foreman of the grand jury of such request, and must subsequently serve upon the applicant, at the address specified by him, a notice that he will be heard by the grand jury at a given time and place. Upon appearing at such time and place, and upon signing and submitting to the grand jury a waiver of immunity pursuant to section 190.45, such person must be permitted to testify before the grand jury and to give any relevant and competent evidence concerning the case under consideration. Upon giving such evidence, he is subject to examination by the people.

(c) Any indictment or direction to file a prosecutor's information obtained or filed in violation of the provisions of paragraph (a) or (b) is invalid and, upon a motion made pursuant to section 170.50 or section 210.20, must be dismissed; provided that a motion based upon such ground must be made not more than five days after the defendant has been arraigned upon the indictment or, as the case may be, upon the prosecutor's information resulting from the grand jury's direction to file the same. If the contention is not so asserted in timely fashion, it is waived and the indictment or prosecutor's information may not thereafter be challenged on such ground.

6. A defendant or person against whom a criminal charge is being or is about to be brought in a grand jury proceeding may request the grand jury, either orally or in writing, to cause a person designated by him to be called as a witness in such proceeding. The grand jury may as a matter of discretion grant such request and cause such witness to be called pursuant to subdivision three.

at any time after the service of a subpoena pursuant to such a direction and before the return date thereof, the people may apply to the court which impaneled the grand jury for an order vacating or modifying such direction or subpoena on the ground that such is in the public interest. Upon such application, the court may in its discretion vacate the direction or subpoena, attach reasonable conditions thereto, or make other appropriate qualification thereof.

4. Notwithstanding the provisions of subdivision three, the district attorney may demand that any witness thus called at the instance of the grand jury sign a waiver of immunity pursuant to section 190.45 before being sworn, and upon such demand no oath may be administered to such witness unless and until he complies therewith.

5. Although not called as a witness by the people or at the instance of the grand jury, a person has a right to be a witness in a grand jury proceeding under circumstances p escribed in this subdivision:

(a) When a criminal charge against a person is being or is about to be or has been submitted to a grand jury, such person has a right to appear before such grand jury as a witness in his own behalf if, prior to the filing of any indictment or any direction to file a prosecutor's information in the matter, he serves upon the district attorney of the county a written notice making such request and stating an address to which communications may be sent. The district attorney is not obliged to inform such a person that such a grand jury proceeding against him is pending, in progress or about to occur unless such person is a defendant who has been arraigned in a local criminal court upon a currently undisposed of felony complaint charging an offense which is a subject of the prospective or pending grand jury proceeding. In such case, the district attorney must notify the defendant or his attorney of the prospective or pending grand jury pro-

ceeding and accord the defendant a reasonable time to exercise his right to appear as a witness therein;

(b) Upon service upon the district attorney of a notice requesting appearance before a grand jury pursuant to paragraph (a), the district attorney must notify the foreman of the grand jury of such request, and must subsequently serve upon the applicant, at the address specified by him, a notice that he will be heard by the grand jury at a given time and place. Upon appearing at such time and place, and upon signing and submitting to the grand jury a waiver of immunity pursuant to section 190.45, such person must be permitted to testify before the grand jury and to give any relevant and competent evidence concerning the case under consideration. Upon giving such evidence, he is subject to examination by the people.

(c) Any indictment or direction to file a prosecutor's information obtained or filed in violation of the provisions of paragraph (a) or (b) is invalid and, upon a motion made pursuant to section 170.50 or section 210.20, must be dismissed; provided that a motion based upon such ground must be made not more than five days after the defendant has been arraigned upon the indictment or, as the case may be, upon the prosecutor's information resulting from the grand jury's direction to file the same. If the contention is not so asserted in timely fashion, it is waived and the indictment or prosecutor's information may not thereafter be challenged on such ground.

6. A defendant or person against whom a criminal charge is being or is about to be brought in a grand jury proceeding may request the grand jury, either orally or in writing, to cause a person designated by him to be called as a witness in such proceeding. The grand jury may as a matter of discretion grant such request and cause such witness to be called pursuant to subdivision three.